Supreme Court, U.S.
FILED
FEB 8 1993
OFFICE OF THE CLERK

No. 92-828

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES R. CRUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MERVYN HAMBURG
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court violated the Ex Post Facto Clause when it applied Sentencing Guidelines amendments that became effective in 1989 and 1990 to petitioner, who pleaded guilty to a conspiracy that continued into 1991.

2. Whether the district court erred in accepting petitioner's guilty plea and in refusing to allow him to withdraw that plea.

3. Whether the court of appeals erred in refusing to order the district judge to recuse himself from petitioner's resentencing.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Liljeberg v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988)	10, 11
United States v. *Bakker*, 925 F.2d 728 (4th Cir. 1991)	7
United States v. *Barsanti*, 943 F.2d 428 (4th Cir. 1991), cert. denied, 112 S. Ct. 1474 (1992)	5
United States v. *Bloom*, 945 F.2d 14 (2d Cir. 1991)	7
United States v. *Burger*, 964 F.2d 1065 (10th Cir. 1992), petition for cert. pending, No. 92-7196	4, 10
United States v. *Hickok*, 907 F.2d 983 (10th Cir. 1990)	8, 9
United States v. *Lambey*, 974 F.2d 1389 (4th Cir. 1992)	9
United States v. *Morrison*, 938 F.2d 168 (10th Cir. 1991)	5
United States v. *O'Hara*, 960 F.2d 11 (2d Cir. 1992)	8
United States v. *Pollard*, 959 F.2d 1011 (D.C. Cir.), cert. denied, 113 S. Ct. 322 (1992)	10
United States v. *Rhodes*, 913 F.2d 839 (10th Cir. 1990), cert. denied, 111 S. Ct. 1079 (1991)	8-9
United States v. *Story*, 891 F.2d 988 (2d Cir. 1989)	5
United States v. *Underwood*, 932 F.2d 1049 (2d Cir.), cert. denied, 112 S. Ct. 382 (1991)	5
United States v. *White*, 869 F.2d 822 (5th Cir.), cert. denied, 490 U.S. 1112 (1989)	5
United States v. *Williams*, 897 F.2d 1034 (10th Cir. 1990), cert. denied, 111 S. Ct. 2064 (1991)	5

Constitution, statutes, and rules: Page

U.S. Const. Art. I, § 9, Cl. 3 (Ex Post Facto Clause) 3, 4, 5, 7
18 U.S.C. 371 2
18 U.S.C. 1344 (1988 & Supp. III 1991) 2
28 U.S.C. 455(a) 10
Fed. R. Crim. P.:
Rule 11(f) 6
Rule 32(d) 8
Sentencing Guidelines § 2F1.1 3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-828

JAMES R. CRUCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-14, is unpublished, but the judgment is noted at 968 F.2d 21 (Table). Two orders of the district court, Pet. App. 28-41 and 42-56, are reported at 770 F. Supp. 598 and 773 F. Supp. 289.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1992. A petition for rehearing was denied on July 21, 1992. Pet. App. 57-58. The petition for a writ

of certiorari was filed on October 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty to one count of conspiracy to defraud and three counts of defrauding a federally chartered and insured savings and loan institution, in violation of 18 U.S.C. 371 and 1344 (1988 & Supp. III 1991). He was sentenced to 168 months' imprisonment and ordered to pay $8 million in restitution. The court of appeals affirmed the conviction, but remanded for resentencing.

1. Petitioner was the president of Peoples Heritage Savings and Loan of Salina, Kansas. Pet. App. 2. Petitioner also sat on the board of directors of Peoples Heritage and owned 50% of the savings and loan's parent company. *Ibid.* Through various devices and schemes, petitioner and others appropriated more than $80 million from Peoples Heritage. Pet. App. 24. The grand jury returned two indictments against petitioner. One indictment charged petitioner with 13 counts of conspiracy and bank fraud. Gov't C.A. Br. 6 n.2. The other indictment charged petitioner with 25 counts of conspiracy, bank fraud, and making false statements to a federal agency. C.A. App. A1-A47.

Pursuant to a plea agreement, petitioner pleaded guilty to four of the counts charged in the 25-count indictment—one count of conspiracy and three counts of bank fraud. Pet. App. 2. The three substantive counts involved a scheme to appropriate funds for petitioner and others by setting up a sham line of credit at Peoples Heritage. *Ibid.*; see C.A. App. A35-

A41. In return, the government agreed to dismiss the remaining counts of the 25-count indictment and all the counts of the 13-count indictment. The government also agreed to forgo any additional prosecution of petitioner in the District of Kansas for transactions involving Peoples Heritage, to recommend to any other prosecuting authorities that any sentence for transactions involving Peoples Heritage run concurrently with the sentence imposed in this case, not to oppose petitioner's request regarding the place of his incarceration, and to recommend a downward departure based on acceptance of responsibility. C.A. App. A58.

The district court sentenced petitioner to 168 months' imprisonment and ordered him to pay $8 million in restitution. Pet. App. 18, 22. In determining the sentence, the district court applied amendments to Sentencing Guidelines § 2F1.1 that became effective in 1989 and 1990. See Pet. App. 3. As compared to the 1988 Guidelines, the amendments authorized a 13-level increase in petitioner's base offense level. See Pet. 9-10. Because the court found that petitioner's involvement in the conspiracy continued past the effective date of the amended Guidelines, the court rejected petitioner's claim that the application of those Guidelines violated the Ex Post Facto Clause, Art. I, § 9, Cl. 3. Pet. App. 30-36. The district court also refused to allow petitioner to withdraw his guilty plea. Pet. App. 36-39.

After petitioner was sentenced, he learned that the Resolution Trust Corporation (RTC) and the Federal Deposit Insurance Corporation (FDIC) had sent letters to the district court discussing his case. See C.A. App. A322-A337 (RTC letter); C.A. App. A338

(FDIC letter). Because he considered the letters improper ex parte contacts, petitioner asked the district judge to recuse himself. Petitioner also moved for reconsideration of his sentence. The district court denied both motions. Pet. App. 55.

2. The court of appeals affirmed the conviction, rejecting petitioner's contention that the district court erred in accepting his guilty plea and refusing to allow him to withdraw his plea. Pet. App. 12-13. The court also rejected most of petitioner's challenges to his sentence, including his claim that the district court's application of the amended Sentencing Guidelines violated the Ex Post Facto Clause. Pet. App. 5-6. The court vacated the sentence and remanded for resentencing, however, to give petitioner an opportunity to comment on the RTC and FDIC letters. Pet. App. 10-11, 14. The court of appeals held that the district judge was not required to recuse himself from petitioner's resentencing. Pet. App. 9-11. Although the mandate issued on July 29, 1992, petitioner has not yet been resentenced.[1]

---

[1] Thomas Burger was the chief lending officer for Peoples Heritage and served on the board of directors. C.A. App. A2. Burger pleaded guilty to one conspiracy count and four substantive counts of bank fraud, all arising out of the same sham loan transaction to which petitioner pleaded guilty. The court of appeals affirmed Burger's conviction, but remanded for resentencing to enable Burger to comment on letters from RTC and FDIC discussing his case. *United States* v. *Burger*, 964 F.2d 1065 (10th Cir. 1992). Burger has filed a petition for a writ of certiorari, No. 92-7196, to which the United States will respond separately. Burger was resentenced on December 29, 1992, and has appealed his new sentence to the Tenth Circuit.

ARGUMENT

1. Petitioner contends that the district court's use of the amended Sentencing Guidelines violated the Ex Post Facto Clause. Pet. 15-19.[2]

When acts constituting a continuing offense occur both before and after the effective date of a Guidelines amendment, it does not violate the Ex Post Facto Clause to sentence the defendant under the amended Guidelines. See, *e.g.*, *United States* v. *Morrison*, 938 F.2d 168, 170 (10th Cir. 1991); *United States* v. *Story*, 891 F.2d 988, 995 (2d Cir. 1989); *United States* v. *White*, 869 F.2d 822, 826 (5th Cir.), cert. denied, 490 U.S. 1112 (1989). That is true of a conspiracy commencing before and continuing beyond the effective date of the Guidelines. See, *e.g.*, *United States* v. *Williams*, 897 F.2d 1034, 1040 (10th Cir. 1990), cert. denied, 111 S. Ct. 2064 (1991). The determination whether an offense continued after a change in the Guidelines is for the sentencing judge, subject to review for clear error. See, *e.g.*, *United States* v. *Barsanti*, 943 F.2d 428, 436 (4th Cir. 1991), cert. denied, 112 S. Ct. 1474 (1992); *United States* v. *Underwood*, 932 F.2d 1049, 1053-1055 (2d Cir.), cert. denied, 112 S. Ct. 382 (1991). In this case, the district court correctly found that petitioner's offense continued into the post-amendment period.

---

[2] The court of appeals vacated the sentence that petitioner challenges in the petition, and the district court has yet to resentence petitioner. For that reason, petitioner's challenge to his sentence is not based on a final judgment against him and is therefore premature. In any event, petitioner's claims lack merit, for the reasons given in the text.

Petitioner pleaded guilty to Count 1 of the indictment, which charged that "[c]ommencing at least as early as 1984, * * * and continuing until the return of this indictment [January 10, 1991]," petitioner and others conspired to commit bank fraud. C.A. App. A5. Petitioner introduced no evidence to suggest that he did anything to withdraw from the conspiracy, and absent some indication of withdrawal, the district court properly found that petitioner's involvement continued until 1991, consistent with the indictment and petitioner's guilty plea.

Petitioner argues, Pet. 16-17, that his plea was limited by his statement that he conspired to defraud Peoples Heritage "[d]uring the time period from 1984 through 1987." Pet. App. 29. Petitioner reads too much into that statement. It was contained in a petition to the district court to enter a guilty plea, see C.A. App. A48-A56, and it served only to satisfy the court that there was a factual basis for the plea. Fed. R. Crim. P. 11(f). Because the substantive counts to which petitioner pleaded guilty related to a specific sham credit transaction, his statement to the court included only the details of that transaction. See Pet. App. 30.

When he entered his guilty plea, petitioner was advised by the district court that the sentencing procedures would be consistent with the provisions of the Sentencing Guidelines; that the Guidelines imposed no limit on the information that the court could consider, as long as the information was reliable; and that the court would "consider all relevant conduct at the time of sentencing, even though you are pleading guilty to less than all counts in the Indictment." C.A. App. A85-A87. The district

court specifically found that petitioner's involvement with the conspiracy extended beyond the date of the Guidelines amendments, Pet. App. 32-33:

> While it is true that the defendants were forced to resign from Peoples Heritage in November 1988, the court finds that the defendants continued their participation and ownership in the joint ventures, corporations, partnerships and property which was obtained with money illegally defrauded from Peoples Heritage. Further, their participation in these ventures continued unimpeded until the issuance of the Indictment. Thus, while defendants may not have been employed by Peoples Heritage after November 1988, they had not extricated themselves from the joint ventures, partnerships and other entities which were set up to defraud Peoples Heritage and which continued into existence beyond the date of their forced resignation.

Based on that finding, the district court and the court of appeals properly concluded that the application of the amended Guidelines did not run afoul of the Ex Post Facto Clause.[3]

---

[3] Contrary to petitioner's assertion, Pet. 18, the decision below does not conflict with *United States* v. *Bloom*, 945 F.2d 14 (2d Cir. 1991), or *United States* v. *Bakker*, 925 F.2d 728 (4th Cir. 1991). In *Bloom*, the court held that the defendant properly was not given a Guidelines sentence because he specifically disclaimed that his conduct encompassed acts occurring after the effective date of the Guidelines, and the court had no basis to conclude to the contrary. 945 F.2d at 17-18. In *Bakker*, the defendant went to trial, and there was no evidence that the conspiracy extended beyond the effective date of the Guidelines. 925 F.2d at 739. Here, by contrast, petitioner pleaded

2. Petitioner contends that the district court erred in accepting his guilty plea and in refusing to permit him to withdraw that plea. Pet. 19-21.

a. Petitioner's argument that the district court erred in accepting his guilty plea is based on the mistaken premise that the record shows that the conspiracy ended before the effective date of the amendments. See Pet. 21. As discussed above, however, the indictment to which petitioner pleaded guilty specifically charged that the conspiracy continued into 1991, petitioner offered no evidence of withdrawal from the conspiracy, and the district court found as a fact that petitioner's involvement with the conspiracy continued until he was indicted. The court of appeals properly concluded that the district court did not err in accepting petitioner's guilty plea. Pet. App. 12.

b. Petitioner also argues that the district court was required to allow him to withdraw his guilty plea. Pet. 19-20. Once a defendant enters a guilty plea, however, he has no right to withdraw it. *United States* v. *Hickok*, 907 F.2d 983, 985 (10th Cir. 1990). The district court "may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason," Fed. R. Crim. P. 32(d), a decision that rests in the sound discretion of the district court. See, *e.g.*, *United States* v. *O'Hara*, 960 F.2d 11, 13-14 (2d Cir. 1992); *United States* v. *Rhodes*, 913 F.2d 839, 845 (10th

---

guilty to an indictment charging an ongoing conspiracy; he did not disclaim or attempt to disprove that the conspiracy continued past the effective date of the Guidelines amendments; and the district court specifically found that the conspiracy continued until petitioner was indicted.

Cir. 1990), cert. denied, 111 S. Ct. 1079 (1991). The defendant has the burden of proving the existence of a "fair and just reason." *United States* v. *Hickok*, 907 F.2d at 985.

The only reason offered by petitioner for withdrawing his plea was the district court's determination that petitioner was subject to the amended Guidelines. In the plea agreement, however, petitioner agreed that "[t]he sentencing guidelines shall apply to this case" and that "the sentencing judge alone will decide what sentence to impose." C.A. App. A59. Petitioner agreed "that even if he should later not be satisfied with his sentence, he shall have no right to withdraw his guilty plea after acceptance of his plea by the [district court]." *Ibid.* As the court of appeals noted, "[petitioner] entered a voluntary and knowing plea upon the advice of counsel and after careful and extensive questioning by the district [court] as to the nature and consequences of his plea." Pet. App. 13. Under these circumstances, the court properly held that the district court did not err in refusing to allow petitioner to withdraw his plea because he was dissatisfied with his sentence. *Ibid.*; see also *United States* v. *Lambey*, 974 F.2d 1389, 1393-1396 (4th Cir. 1992) (en banc).

3. Finally, petitioner contends that the court of appeals erred by not ordering the district judge to recuse himself from petitioner's resentencing. Pet. 22-24.

Petitioner's claim of bias is based on letters sent to the district court by RTC and FDIC. See Pet. App. 9-10 (summarizing letters). But RTC, which has assumed receivership of Peoples Heritage, and FDIC, which insures the accounts there, were victims of

petitioner's crimes. Pet. App. 45; *United States* v. *Burger*, 964 F.2d at 1071. A district court's receipt of letters from victims would not make it "appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation," *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988), and thus does not create any need for recusal. See 28 U.S.C. 455(a).

Indeed, petitioner specifically agreed in the plea agreement that "the government may consult the appropriate federal regulatory agency regarding the nature and seriousness of his misconduct, and make known the impact of such misconduct upon the financial institution, the institution's depositors, others involved and the public at large." C.A. App. A60. In evaluating the district judge's refusal to recuse himself, it should make no difference that RTC and FDIC mailed their letters directly to the court, rather than to the United States Attorney for transmittal. That is particularly true where, as here, the district court merely passed the letters on to the probation office. See Pet. App. 46. In any event, the district judge stated that he did not consider the communications before imposing sentence. Pet. App. 49. Accordingly, the court of appeals properly declined to order the judge to recuse himself. See *United States* v. *Pollard*, 959 F.2d 1011, 1030-1031 (D.C. Cir.), cert. denied, 113 S. Ct. 322 (1992).[4]

---

[4] Because the RTC and FDIC letters were not prohibited ex parte communications and were not considered by the district court, the decision below does not conflict with any of the cases cited by petitioner, see Pet. 24, which involved ex parte contacts between the prosecutor and trial judge. To the extent that petitioner's complaint rests on the fact that he was not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MERVYN HAMBURG
Attorney

FEBRUARY 1993

---

notified of the letters before sentencing, the court of appeals' resentencing order fully addresses any fairness concerns. Cf. *Liljeberg*, 486 U.S. at 862.